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No. 79-972

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,
*Petitioners,*

v.

ADAMS EXTRACT COMPANY, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## THE MEAD CORPORATION'S REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO MEAD'S MOTION TO INTERVENE AND RESPONSE TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

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Pursuant to Rule 42.4 of the Rules of the United States Supreme Court, The Mead Corporation ("Mead"), as intervenor or *amicus curiae*, respectfully submits this reply to respondents' memorandum, filed September 26, 1980, in opposition to Mead's motion to intervene and

this response to respondents' motion, filed September 24, 1980, to dismiss the writ of certiorari in the above entitled case on the ground of mootness or, in the alternative, as improvidently granted. Mead does not believe that petitioners' appeal is moot for the reasons set forth in petitioners' response to the motion to dismiss. While Mead believes this is clear, Mead submits that granting its motion to intervene as a party petitioner will remove any possible question of alleged mootness from this appeal.

One simple fact commands attention: the variety of filings in this appeal vividly demonstrates the plethora of interests and positions on the issue of contribution that need to be resolved by this Court on this appeal. This alone provides ample justification for hearing this appeal. Moreover, all of the parties which have filed motions and briefs on this appeal implicitly recognize that Mead, as the only nonsettling defendant in the class actions of the *Corrugated Container Antitrust Litigation*, M.D.L. 310, has a substantial interest in this appeal and is directly affected by the issue of contribution on which this Court granted certiorari. Respondents are attempting to remove this appeal from this Court primarily because Mead is seeking contribution from them in this litigation. Respondents hope that this appeal will evaporate and that another appeal concerning this same issue of contribution in this litigation will not reach this Court later.

## ARGUMENT

### I. THIS COURT SHOULD GRANT MEAD'S MOTION TO INTERVENE AS A PARTY PETITIONER TO REMOVE ANY POSSIBLE QUESTION OF ALLEGED MOOTNESS FROM THIS APPEAL

This Court granted certiorari in M.D.L. 310 to review the issue of contribution among antitrust defendants. This issue necessarily encompasses contribution by and against settling and nonsettling defendants and claim reduction which is a mechanism to implement contribution where there have been settlements with plaintiffs by some, but not all, defendants. This Court may resolve on this appeal the full panoply of issues concerning contribution among antitrust defendants. Such resolution here would greatly aid in the administration of M.D.L. 310, where the issue of contribution continues to exist, as well as other antitrust class actions.

As the only nonsettling defendant in the M.D.L. 310 class actions, Mead unquestionably has the requisite direct stake in the outcome of this controversy to satisfy the requirements of standing. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). There is also a concrete case or controversy, as required by Article III of the United States Constitution, between Mead and respondents concerning the issue of contribution in this litigation on which this Court granted certiorari. *See Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975); *Bank of Marin* v. *England*, 385 U.S. 99, 100 (1966). Thus, Mead's motion to intervene as a party petitioner, filed September 17, 1980, should be granted to remove any possible question raised by respondents that this appeal is moot.

Mead has always had a vital and legitimate interest in the appeal before this Court. Mead filed a separate complaint on May 21, 1979 in the District Court for the District of Minnesota, *The Mead Corporation* v. *Alton*

*Box Board Co.*, Civil No. 4-79-245, alleging the same rights of contribution sought here by the petitioners. Mead claimed contribution against settling and non-settling defendants.[1] The Judicial Panel on Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310 (Civ. No. H-79-1436). While the district court on December 21, 1979 filed an opinion dismissing Mead's claims for contribution, no final judgment has ever been entered dismissing Mead's complaint, as required by either Rule 58 or Rule 54(b) of the Federal Rules of Civil Procedure. On January 3, 1980, Mead filed a motion for reconsideration and on January 21, 1980 plaintiffs filed their objections to the motion. Respondents concede that the district court has never ruled on that motion. But for the absence of the entry of a final judgment, Mead would have filed a notice of appeal and would also be a petitioner on the appeal before this Court.[2]

Respondents' sole argument against permitting Mead to intervene before this Court is that "Mead could have

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[1] Mead's complaint for contribution was filed in the class actions as well as in the individual opt-out cases filed by plaintiffs in M.D.L. 310.

[2] Erroneously and without basis, respondents state that the pretrial order constituted a "final appealable judgment" and that Mead "elected to forego . . . any appeal from the dismissal of its contribution complaint" (Motion of Respondents at 5-6). The paragraph of the district court's pretrial order which dismissed Mead's contribution claim was not a "judgment." Rule 58 of the Federal Rules of Civil Procedure requires that "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." *See United States* v. *Indrelunas*, 411 U.S. 216 (1973). Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides that "[a] judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Since no separate judgment has ever been entered dismissing Mead's complaint for contribution, the time for filing a notice of appeal which commences upon the "entry of judgment" has not yet begun to run under Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

petitioned for intervention" in the court of appeals (Memorandum of Respondents at 7). Since Mead's interests were similar to those of appellants, the proper procedure to protect Mead's interests, at that time, was to participate in those proceedings as *amicus curiae*, which Mead did, because a defendant is entitled to the benefit of an appeal taken by co-defendants. *Moitie* v. *Federated Department Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980). Mead's participation in the court of appeals as *amicus curiae* was based upon proper procedure, since the district court had failed to enter a final judgment from which Mead could have taken a separate appeal at that time.

Mead followed the same procedure in this Court by first filing a motion and brief as *amicus curiae*. Mead moved to intervene as a party petitioner only after Westvaco Corporation ("Westvaco") settled the class action cases (just 33 days ago on September 3, 1980) and "agreed" (or was coerced) as a condition of that settlement to attempt to withdraw this appeal. Prior to this, the circumstances did not warrant intervention on Mead's part since respondents did not then contend that the appeal was moot. The use of proper procedure by Mead should not provide a basis now for penalizing Mead for intervening circumstances beyond its control. Given the fact that the district court decided the issue of contribution and entered a final judgment as to petitioners and the court of appeals affirmed the district court's decision, it makes no sense to dismiss petitioners' appeal in this Court and wait for the issue to be briefed again in the same case by Mead in the court of appeals and then for Mead to petition this Court again for review at that time. This is especially so since all must concede that Mead is directly affected by the contribution issue in M.D.L. 310.

This Court has previously permitted a nonparty to proceedings below, whose rights are affected by that judg-

ment, to intervene by motion after certiorari has been granted where justice demands that intervention be permitted. Thus, in *NLRB* v. *Acme Industrial Co.*, 384 U.S. 925 (1966), this Court allowed a union, which had not participated in the judicial review proceedings below, to intervene as a party and file a brief to support its interests in the labor controversy. In *Eastern-Central Motor Carriers Association* v. *United States*, 321 U.S. 194, 198-99 n.5 (1944), a motion by a trade association to intervene was granted by this Court even though the intervenor had not participated in the prior proceedings before the three-judge district court. Furthermore, this Court in *United States* v. *Terminal Railroad Association*, 236 U.S. 194 (1915), permitted intervention in appeals pending before this Court in order "to ask a modification of the decree" to the extent that it was prejudicial to the interests of the intervenors. *Id.* at 199. Although the intervening parties in *Terminal Railroad* had been denied leave to intervene in the court below, they did not seek review from that denial of intervention. *Id.* at 198. Instead, they filed original motions to intervene in the proceedings pending before this Court, which were granted, and were allowed to file briefs and to participate in oral argument. *Id.* at 199. This Court held:

> [A]lthough the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights. *Id.* at 199.

In *Mullaney* v. *Anderson*, 342 U.S. 415, 416-17 (1952), this Court granted a motion to intervene which added two new parties as plaintiffs-respondents after the merits of the controversy were before this Court. Defendants-petitioners questioned for the first time the standing of the original respondents to maintain the action and intervention was permitted explicitly to "remove the matter from controversy." *Id.* at 416.

A nonparty has even been permitted to intervene in this Court for the sole purpose of filing a petition for certiorari where its interests had been adequately represented below, but the losing party failed to prosecute an appeal in this Court. *Banks* v. *Chicago Grain Trimmers Association*, 390 U.S. 459 (1968); *see also Hunter* v. *Ohio ex rel. Miller*, 396 U.S. 879 (1969).

Moreover, in a civil class action, *Rogers* v. *Paul*, 382 U.S. 198, 199 (1965), this Court granted a motion for intervention to add two putative class members as petitioners to avoid potential mootness that could have resulted from the removal of the original petitioners from the class.[3]

Thus, Mead's motion to intervene as a party petitioner should be granted to remove any possible question of alleged mootness from this appeal. Plaintiffs' purpose in seeking dismissal of this appeal and opposing Mead's motion to intervene is to continue to use the club of a "no contribution rule" in both the class actions and the opt-out cases in M.D.L. 310 to further their coercive settlement tactics. In the class actions, Mead has approximately 2½ percent of the industry sales of corrugated containers, but plaintiffs continue to seek to hold Mead liable for industry-wide sales to class members. This "legalized blackmail" can be prevented by permitting contribution.[4] The granting of Mead's motion to inter-

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[3] Respondents concede that intervention was permitted in *Rogers*, *Mullaney*, *Banks*, and *Eastern-Central Motor Carriers Ass'n* even though "the intervenors were not parties to the proceedings below" (Memorandum of Respondents at 7), but do not admit that nonparties intervened in *Terminal Railroad* and *Acme* despite the fact that this Court in *Terminal Railroad* stated that "the petitioners were not parties" (*id.* at 199) and that in *Acme* the intervenor was not a party to the proceedings in the court of appeals (351 F.2d 258).

[4] *Consider Kline* v. *Coldwell, Banker & Co.*, 503 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and class action dismissed on other grounds*, 417 U.S. 156 (1974).

vene would bring before this Court a nonsettling defendant in the class actions in M.D.L. 310 which is most directly affected by the issue of contribution on which this Court granted certiorari.

## II. THE QUESTION PRESENTED FOR REVIEW IS NOT MOOT

In any event, the issue of rights of contribution among antitrust defendants is not moot with respect to petitioners. M.D.L. 310, from which this appeal arose, presents all the permutations encompassed within this Court's writ of certiorari. The issue of contribution is real and continues and should now be decided by this Court. The split among the federal courts of appeals on this issue persists and can only be resolved by this Court. Respondents' invitation to sidestep this fundamental issue should be declined. The interests of justice as well as the limited resources of the federal judiciary would best be served by this Court's retention of jurisdiction to decide this appeal. It would be a needless waste of time to dismiss this writ only to grant another immediately on the identical issue or to await the inevitable relitigation of the same issue in M.D.L. 310 through each level of the federal court system.[5]

Respondents contend that the controversy on this appeal is moot because petitioners' cross claims "were asserted only against *settling defendants*" (Motion of Respondents at 3) (emphasis in original).[6] This contention

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[5] In addition to the arguments herein, Mead adopts and incorporates by reference the arguments set forth in the response filed by petitioners in opposition to respondents' motion to dismiss.

[6] Respondents' fragmentation of the question presented for review, if accepted, would sanction needless piecemeal litigation, a situation repeatedly condemned by this Court. *See Commissioner* v. *Sunnen*, 333 U.S. 591 (1948); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927); *United States* v. *Continental & Oregon Land Co.*, 192 U.S. 355 (1904); *Stark* v. *Starr*, 94 U.S. 477 (1877); *Cromwell* v. *County of Sac*, 94 U.S. 351 (1877).

lacks merit. The question presented for review on which this Court granted certiorari was "[w]hether defendants in antitrust cases may assert rights of contribution" (Petition for Certiorari at 2). The grant of certiorari was not limited to the issue of whether contribution could be asserted against settling defendants. There continues to be a case or controversy in M.D.L. 310 on the issue of contribution among antitrust defendants which is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937).

Despite a recognition by some courts that claim reduction is a way to implement contribution against a settling defendant,[7] respondents assert that " 'claim reduction' is fundamentally different" from contribution against settling defendants and is not properly before this Court (Motion of Respondents at 4). This contention poignantly reveals a basic misconception on the part of respondents. Claim reduction is not different from contribution; it is a mechanism which implements the right of contribution where there have been settlements by some, but not all, defendants.

The question of contribution among antitrust defendants is likely to recur and is of widespread public importance to the fair and equitable administration of antitrust class actions. The contribution issue continues to exist in M.D.L. 310. The cases brought by plaintiffs which opted out of the class actions are pending in M.D.L. 310 and raise the identical claims of contribution and claim reduction. Furthermore, respondents admit that "Mead is completely free to present the claim reduction issue as part of its expected appeal from the verdict to the Fifth Circuit, and if unsuccessful there may apply

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[7] *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1967); *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979); *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954).

to this Court for certiorari on that issue" (Motion of Respondents at 6). The likelihood of recurrence, "together with a public interest in having the [issue of contribution] settled, militates against a mootness conclusion." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). *See also Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968); *Southern Pacific Co.* v. *ICC*, 219 U.S. 498, 515 (1911).[8]

It is not necessary for the issue of contribution, which is likely to recur, to also evade review in order to be justiciable. This Court may continue to exercise its jurisdiction so long as " 'there is [any] reasonable expectation that the wrong will be repeated.' " *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953).[9]

In *Richardson* v. *Ramirez*, 418 U.S. 24 (1974), this Court accepted jurisdiction to rule upon "a question of broad public interest, which was likely to recur," but which did not evade review. *Id.* at 34. In *Ramirez*, three ex-felons challenged a state's election law which denied them the right to vote because of their criminal records. In rejecting arguments to dismiss for mootness, this Court did not rely on the possibility that the issue would evade review, suggesting that such involved "purely practical considerations" which would not control the moot-

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[8] In *Southern Pacific*, this Court stated that "[t]he questions involved in the orders . . . are usually continuing" and that its jurisdiction "ought not to be, as [it] might be, defeated, by [issues] capable of repetition . . . ." 219 U.S. at 515.

[9] In *W. T. Grant*, the Government sought to enjoin an individual from serving on the boards of directors of several competing corporations. Notwithstanding that the issue on appeal would not evade review in the future, this Court held that defendant's resignations from those boards did not moot the appeal as he could at any time resume his directorships and necessitate relitigation of the identical issues. Furthermore, this Court decided to reach the merits, in part, because of the "public interest in having the legality of the practices settled" under the antitrust laws. 345 U.S. at 632.

ness issue. *Id.* at 36. Instead, this Court accepted jurisdiction based on the fact that a "continuing controversy" existed between ex-felons and election officials, notwithstanding that plaintiffs no longer had any legal dispute with defendants. *Id.* at 40.[10]

Respondents argue, in the alternative, that the writ of certiorari should be dismissed as improvidently granted "in the light of changed circumstances" even if this appeal is not "technically moot" (Motion of Respondents at 10). A motion to dismiss a writ of certiorari as improvidently granted should be granted "only in exceptional circumstances." *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U.S. 228, 232 (1972). The only fact that has changed here since the writ was granted is that Westvaco entered into a settlement agreement with plaintiffs in the class action cases. That settlement has not been finally approved. Indeed, notice to the class has not even been sent concerning either Westvaco's settlement or those of the other petitioners. Thus, the class has not yet had its opportunity to object to the settlements. There are no "changed circumstances" with respect to Georgia-Pacific Corporation or Packaging Corporation of America. Westvaco's tentative settlement with plaintiffs has not blurred the issue of contribution. The record on this appeal is more than sufficient to present adequately the question for review.[11] If any litigation presented an appropriate vehicle for this Court's resolution of the issue of contribution among antitrust defendants, M.D.L. 310 is just such a case.

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[10] Significantly, *Ramirez* was decided *after Roe* v. *Wade*, 410 U.S. 113 (1973), which respondents cite for the proposition that to avert mootness an issue which is likely to recur must also evade review.

[11] Westvaco filed its brief on the merits of this appeal prior to its settlement. In addition, the briefs of the other petitioners have been filed as well as those of numerous *amici curiae*. The briefs of respondents are due shortly.

## CONCLUSION

For the foregoing reasons, Mead's motion for leave to intervene as a party petitioner should be granted to remove any possible question of alleged mootness from this appeal and respondents' motion to dismiss the writ of certiorari should be denied because the issue of contribution in M.D.L. 310 is not moot.

Respectfully submitted,

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